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STATE OF MONTANA

Case Number: DA 17-0020

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-17-0020

DENICE A. STOKKE
Plaintiff/Appellant,

vs.

AMERICAN COLLOID COMPANY, A Delaware Corporation; G.K.
CONSTRUCTION, INC., a Wyoming Corporation; and JOHN DOES I-III
Defendants/Appellees

REPLY BRIEF OF APPELLANT DENICE A. STOKKE

On Appeal from the
Montana Twenty Second Judicial District Court, Carbon County
Cause No. DV-15-68
The Honorable Blair Jones, District Court Judge

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RESPONSE TO ACC'S STATEMENT OF FACTS

In support of summary judgment, ACC offers the Court six pages of factual assertions. Most of these do not relate to the legal issues at hand; nor did they serve as a basis for the district court's grant of summary judgment. It appears they represent an effort to undermine Ms. Stokke's veracity and to provide factual argument more appropriately directed at a jury. For example, ACC spends a considerable portion of its statement seeming to argue contributory fault, an issue not invoked by the district court's order. (*See Answer Br.*, pp. 3-4). The content only underscores the impropriety of granting summary judgment in this case. "Since negligence actions ordinarily involve questions of fact, they are generally not susceptible to summary judgment." *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 13, 181 P.3d 601.

Generally speaking, Ms. Stokke addresses ACC's factual assertions where relevant to particular arguments, later in this brief. However, one particular assertion of ACC's bears response here. ACC claims summarily at pages 5-6 that "[ACC's] employees did not have any *responsibility* for maintenance, access, or use of the wells in connection with the area at issue," (Emphasis added). This statement is more in the nature of a legal conclusion than a fact. Later, Ms. Stokke will explain how the statement is incorrect as a matter of law. To the extent, however, that it implies that there was an *agreement* between ACC and 4N Trucking to allocate responsibility to 4N Trucking, the statement is unsupported by the record to which ACC cites.

1 As its basis for the proposition, ACC cites the deposition testimony of Kim
2 Newlin, 47:10-48:5 (located at CR 54, Ex. A). The testimony suggests merely that 4N
3 Trucking did do some maintenance of the well, not the access to it; it does not bear at
4 all on the allocation of responsibility:

5
6 Q. That equipment that's at well site, who actually maintains that
equipment? Do you know?

7 A. Well, there's not much maintaining to it. I've replaced the hose a
couple of times.

8 Q. The hose that would hook up to the tankers?

9 A. Yes.

10 Q. Just because that hose was wearing out and needed replacement?

11 A. Yes.

12 Q. That - - and you did that while you were working for 4N?

13 A. Yes.

14 Q. Did you ever - - did you ever do any other kind of equipment
maintenance or repair on that - - at that well site other than those
hoses?

15 A. Well, we might put gravel down in front where the truck parks,
because it might get muddy, and run a blade through there once
in awhile just to kind of keep the road smooth.

16 Q. Now, when you put gravel down and ran the blade through there,
that was while you were working for 4N?

17 A. Yes.

18 Q. What's - - what was the last day that Ms. Stokke actually worked
for 4N? Do you recall?

19 A. I'd have to look at my notes, but I think the - - September the
25th.

20 The other citation ACC offers for this proposition is similarly off-topic. It simply
21 describes who fixed the well (not the access to the well) when one of 4N Trucking's
22 employees broke it. (*Id.* at 82:23-83:13). The testimony does not establish, as a
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1 factual matter, that 4N Trucking was allocated responsibility for maintaining the well,
2 let alone the access to it.

3 **ARGUMENT**

4 **I. THE DISTRICT COURT ERRED IN HOLDING THAT THE LEGAL DUTIES** 5 **IMPOSED BY THE DOCTRINES OF “PREMISES LIABILITY” AND “OWNER -** 6 **INDEPENDENT CONTRACTOR LIABILITY” ARE MUTUALLY EXCLUSIVE.**

7 As Ms. Stokke explained in her opening brief, the district court erred by treating
8 the liability doctrines of “premises liability” and what it called “owner-independent
9 contractor liability” as if they were mutually exclusive paths to liability. ACC
10 responded by arguing that the standards for claims made by employees of
11 subcontractors against owners and general contractors have been “conflated” into a
12 single, unitary standard. (Answer Br. 11). It further argues that this case is a
13 construction case, and that the factual basis of Ms. Stokke’s claim does not implicate
14 premises liability. Each of these arguments fails, as explained below.

15 **A. There has been no “conflation” of the two standards.**

16 The central contention of ACC’s argument is that, “over the years, the owner-
17 independent contractor liability duty of care has been subsumed into the premises
18 liability duty of care . . .” (Answer Br., 10-11). This Court has never made such a
19 statement; no such holding exists in Montana law. Not even *dictoa* suggests such a
20 result. Moreover, ACC’s contention runs contrary to modern premises liability law.
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1 The foundational authority for ACC’s argument is the 1979 case, *Shannon v.*
2 *Howard S. Wright Const. Co.*, 181 Mont. 269, 593 P.2d 438 (1979). *Shannon* does
3 not support ACC’s argument. ACC relies on *Shannon* for the proposition that “the
4 Court ultimately conflated the premises liability elements and owner-independent
5 contractor liability analysis.” (Answer Br. 14). Nowhere is such a statement made in
6 the case. Nor does its analytical framework support the proposition.

8 The Court clearly did not conflate the two doctrines. Rather, its analysis of
9 each is broken into a separate and distinct portion of the opinion. The Court addressed
10 two discrete questions: Whether “1. Shannon was contributorily negligent, and 2. As
11 owner and prime contractor, [defendants] had a duty to provide [plaintiff], the
12 employee of a subcontractor, with a safe place to work.” *Id.*, 181 Mont. at 271, 593
13 P.2d at 439. The analysis of the first question begins toward the bottom of the page,
14 593 P.2d at 439. Within the analysis of Issue 1, the Court cites to the Restatement
15 (Second) of Torts § 343A for the proposition that “a possessor of land has a duty to
16 protect invitees, in certain circumstances, even against obvious dangers.” *Id.*, 181
17 Mont. at 272, 593 P.2d at 440. The Court then concludes its analysis of Issue 1 at a
18 discrete location midway through page 441. (“... [Plaintiff] is not absolutely barred
19 from recovery on the basis of contributory negligence.”). Only then did the Court
20 proceed to the next issue—which involved the doctrine of independent contractor
21 liability. *Id.*, 181 Mont. at 275, 593 P.2d at 441. (“[Whether] as owner-contractee and
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1 general contractor of the project, [defendants] owed no duty” to the employee). The
2 two doctrines are applied to separate questions. They are not “conflated” as ACC
3 contends.

4 The reasoning of *Shannon* actually supports the need to impose concurrent
5 duties in the present case. In the end, the Court upheld the jury verdict against the
6 owner and general contractor. *Id.*, 181 Mont. at 283, 593 P.2d at 446. Several
7 observations it made along the way are informative as to the present case. For
8 example, the Court noted that situations may exist “where an employee is involved
9 and the employee, if he is to continue his employment, has no alternative but to
10 continue facing the risk or hazard.” *Id.*, 181 Mont. at 273, 593 P.2d at 440. As
11 explained in her opening brief, Ms. Stokke had only been on the job a few months
12 when injured. It is easy to see that a new employee in particular may feel he or she has
13 no alternative but to face a hazard. In a comment sounding as if it could have been
14 drawn from Ms. Stokke’s case, the Court stated,

15 In the present case, Shannon was compelled to use either a ladder or an
16 unsupported plank across a deep ditch if he was to perform his plumbing work.
17 Thus, a situation very much like that described in Illustration 5 to Comment (f)
18 of section 343A occurred here:

19 “5. A owns an office building, in which he rents an office for business
20 purposes to B. The only approach to the office is over a slippery waxed
21 stairway, whose condition is visible and quite obvious. C, employed by B
22 in the office, uses the stairway on her way to work, slips on it, and is
23 injured. Her only alternative to taking the risk was to forgo her
24 employment. A is subject to liability to C.”

1 *Id.*,

2
3 *Shannon* neither supports the proposition that premises liability and
4 independent contractor liability standards have been conflated, nor provides support
5 for ACC's fact-based arguments. Indeed, the case mandates the opposite conclusion.

6 Furthermore, to adopt the rule that ACC advances would create a direct conflict
7 with current day, i.e. post-1997, premises liability law. In, *Richardson v. Corvallis*
8 *Pub. Sch. Dist. No. 1*, 286 Mont. 309, 950 P.2d 748 (1997), the Court revised formerly
9 inconsistent premises liability standards, and adopted wholesale the Restatement
10 (Second) of Torts § 343A(1) (1965). The Court expressly shifted the law toward
11 holding landowners responsible for conditions upon their land. It stated that its
12 "decision here follows '[t]he manifest trend of the courts in this country . . . away
13 from the traditional rule absolving, *ipso facto*, owners and occupiers of land from
14 liability for injuries resulting from known or obvious conditions, and toward the
15 standard expressed in section 343A(1) of the Restatement (Second) of Torts (1965).'"
16 Richardson, 286 Mont. at 322, 950 P.2d at 756. The Richardson Court also
17 reaffirmed its holding in *Limberhand v. Big Ditch Co.*, 706 P.2d 491, 498 (Mont.
18 1985) that, "[t]he test is always not the status of the injured party but the exercise of
19 ordinary care in the circumstances by the landowner." Richardson, 286 Mont. at 317,
20 950 P.2d at 753.
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1 ACC's argument violates both principles expressed in *Richardson*. It would
2 create an exculpatory rule that would alleviate landowners from responsibility to
3 exercise ordinary care in connection with conditions upon their land. It would create a
4 test based upon the status of the injured party (i.e. employee of subcontractor) rather
5 than the exercise of reasonable care by the landowner toward all invitees. An
6 employee of a subcontractor could be injured by the very same condition under the
7 same circumstances as any another invitee, and yet would have no right of recovery.¹

8
9 **B. This is not a construction industry case.**

10 As another means of avoiding its duties under premises liability law, ACC
11 argues that its operations are akin to construction, and thus, that the duty analysis
12 should take place under construction industry standards rather than premises liability.
13 Here, ACC reveals how it seeks to have it both ways. Elsewhere, ACC goes to great
14 lengths to downplay the risks of Ms. Stokke's job, arguing that she was nothing more
15 than a driver who happened to be working in a mine setting. Here, however, ACC
16 argues that because "Stokke was required to wear a hard hat, steel toed boots, and a
17 reflective vest when on the job site", this case "essentially *is* a construction site case."
18 (Answer Br.18) (emphasis original).
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22 ¹ Indeed, ACC expressly asks the Court to create this special class of invitees and to treat them
23 differently when, on page 13 of the Answer Brief, it states: "While these two theories of liability
24 both have independent elements and analysis, *for the purposes of determining the liability of owners and general contractors in claims made by employees of subcontractors*, the elements have been combined." (Emphasis added)).

1 The reality is that ACC's operation is not a *construction* site, like those in
2 which the owner-independent contractor rule has historically been applied. It is an
3 *industrial* site. Ms. Stokke would agree that there were unique hazards presented by
4 the industrial mining setting in which she was working. However, safety issues
5 presented in industrial settings are substantively different than those presented in
6 construction settings; this is evidenced by the fact that OSHA regulations address each
7 setting separately. OSHA promulgates one set of workplace safety regulations for
8 general industry (29 CFR Part 1910 et. seq.), and another set titled the "Construction
9 Safety Act" for construction settings (29 CFR Part 1926 et. seq.). *See* 29 CFR §
10 1910.12 (distinguishing construction from general industry standards).

13 Certain OSHA safety requirements do not apply to the construction setting due
14 to its unique factors. Among the factors justifying this differential treatment are
15 tendencies in the construction setting to more transient exposure to certain risks,
16 impracticability of monitoring where activities are not occurring on a regular basis in
17 fixed places, and the prohibitive expense of setting up certain safety mechanisms for
18 short-term jobs. *See* discussion at *United Steelworkers of America v. Marshall*, 647
19 F.2d 1189, 1309-11 (D.C. Cir. 1980). Fundamentally, construction sites tend to be
20 dynamic and changing, rendering it infeasible to employ some of the safety measures
21 that are feasible in a more static setting. *See Id.* Here, as ACC points out, it has been
22 operating the Bentonite mine for many years, and the particular well had been in use
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1 since 2005. (Answer Br. 4). ACC offers no evidence that its operations involve
2 changing conditions that would render it infeasible to take simple actions like
3 installing a proper pedestrian bridge to access the well. To allow industrial property
4 owners to escape their obligations under premises liability law would actually have a
5 negative effect on worker safety—creating an exculpatory rule for industrial settings.
6 Public policy should favor the opposite result, i.e. maximization of worker safety.
7 The nature of the mine operation is different than a construction setting.
8

9 Regardless of safety considerations, however, the discussion relied upon by
10 ACC in *Steichen v. Talcott Properties, LLC*, 2013 MT 2, 292 P.3d 458, 461 (2013),
11 centered on the contractual relations between the parties as opposed to the physical
12 characteristics of the work site. This Court explained, “In construction projects there
13 are often layers of involvement with the project owner, the general contractor,
14 subcontractors, independent contractors and employees of each of them.” *Id.*, ¶ 13.
15 Construction contracts and the various relationships they establish can indeed be quite
16 complex. *See, e.g.*, State of Montana Standard Specifications for Road and Bridge
17 Construction (2014).² However, the situation in the present case is nothing like the
18 complexity of the typical construction situation. Here, ACC contracted directly with
19 Ms. Stokke’s employer, 4N Trucking. See Opening Br., Appdx. 2. There were no
20 intermediate contractor or subcontractor relationships. The contract established a
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24 ² Available at
http://www.mdt.mt.gov/other/webdata/external/const/specifications/2014/2014_stand_specs

1 direct relationship between ACC and 4N Trucking. It is simple—a mere 10 pages of
2 substantive text (double spaced). *Id.* If the subject contract is akin to those in the
3 construction industry, then virtually every service contract is as well.

4
5 Such a holding would extend the exculpatory aspects of the owner-independent
6 contractor rule into nearly every owner-vendor relationship. As explained earlier,
7 such a rule would in effect create a new category of invitees for purposes of premises
8 liability. It would disregard both the physical characteristics of typical construction
9 endeavors and the contractual relationships inherent in such endeavors.

10
11 **C. Ms. Stokke's claims do invoke premises liability law.**

12 ACC's final argument on this subject claims that Ms. Stokke's complaint
13 "implicate[s] not the condition of the land owned by American Colloid, but rather the
14 method of performance pursuant to a contract for labor and services between her
15 employer and American Colloid." (Answer Br., 20). Thus, ACC contends, the
16 district court was correct in applying only independent contractor rules to the case.

17 In support, ACC selectively cites the allegations of the Complaint (i.e., CR 1, ¶¶
18 29, 21). In so doing, ACC disregards other allegations of the Complaint, as well as
19 expert evidence in the case. As to the Complaint, Ms. Stokke alleged that: ACC
20 owned the mining claims at issue (¶ 12), owned the land underlying the mine (¶ 16),
21 owned the water well itself (¶ 17), the only way to access the well was to cross over
22 the drainage ditch by use of five or six 2x4 boards (¶ 19), ACC did not provide a safe
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1 work environment “for the Plaintiff and other persons accessing the water well” (§
2 21), ACC personnel did not warn her of the “safe access to and from [ACC’s] water
3 well” (§ 25.B.), and “ACC failed to provide safe access to and from its water well” (§
4 25.B.).

5
6 As to evidence, she offered the opinion of expert Spadaro that “[ACC]
7 constructed and/or maintained and allowed to remain in place an unstable platform
8 that could not be crossed safely to service the water trucks at the well site.” (Dkt. 62.
9 Ex “5” at 14 Spadaro Report). He further opined that the bridge was “unstable [and]
10 in an area that did not have illumination.” *Id.*,

11
12 Particularly in light of Montana’s notice pleading rules³, the premises liability
13 standard does apply to this case.

14 **II. EVEN IF ONLY THE “INDEPENDENT CONTRACTOR LIABILITY” STANDARD**
15 **APPLIES, THE DISTRICT COURT ERRED BY NOT APPLYING ANY OF THREE**
16 **EXCEPTIONS.**

17 There are three exceptions within the independent contractor doctrine: (1) where
18 the activity is inherently dangerous, (2) where the general contractor negligently
19 exercises control reserved over a subcontractor’s work, and (3) where there is a non-
20 delegable duty. *See Beckman v. Silver-Bow County*, 2000 MT 112, 1 P.12, 1 P.3d
21 348. Here, all three exceptions apply.

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24 ³ “A pleading need only provide ‘a short and plain statement of the claim . . .’” *McJunkin v.*
Kaufman and Broad Home Sys., Inc 229 Mont. 432, 436, 748 P.2d 910, 913 (1987).

1 **A. ACC offers the same arguments that the Cobos and Paull courts**
2 **roundly rejected.**

3 Mining is an inherently dangerous activity. *See Cobos v. Stillwater Min. CO.*, CV
4 11-18-BLG-RFC, 2012 WL 6018147, at *6 (D. Mont. Dec. 3, 2012) (“it is reasonable
5 to conclude that it [mining] is an inherently dangerous activity”); 30 U.S.C. § 801
6 (1983); *McColgan v. United Mine Workers of America*, 124 Ill. App. 3d 825, 464
7 N.E.2d 1166, 1169, 80 Ill. Dec. 183 (Ill., 1984). The question before this Court is
8 whether or not Ms. Stokke’s activities in furtherance of ACC’s mining operation, and
9 on its mine property, fall within the recognized “inherently dangerous” exception to
10 the independent contractor rule. *Cobos*, and the other case discussed by ACC, *Paull v.*
11 *Park County*, 2009 MT 321, 352 Mont. 465, 218 P.3d 1198, solidly support the
12 conclusion that this exception should apply.

13
14 ACC distinguishes the facts at bar from the facts in *Cobos and Paull* by
15 focusing on the discrete, individual tasks performed by the plaintiffs in all three cases.
16 The Courts in *Cobos* and “*Paull*” batted down this line of reasoning. In *Paull*, the
17 plaintiff, a probationer, suffered injuries when a driver employed by the company
18 tasked with transporting him rolled the van in which Paul was riding. *Paull* at ¶ 12.
19 Paull alleged the van driver swerved the vehicle in an effort to make the transportees
20 spill the bottles in which they were urinating. *Id.* The defendants argued that the
21 driver merely swerved. *Id.*, ¶ 26. The Court never definitively identified the cause of
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1 the crash. Holding that long-haul interstate transport of prisoners is an inherently
2 dangerous activity, the Court reasoned,

3 When such prisoners are transported, especially over long distances over
4 multiple days that require at least some stops along the way, security
5 concerns make even food and bathroom stops potentially dangerous
6 events. Prisoner escape is clearly always a concern and danger...
7 Prisoners who escape or attempt to escape during transport present an
inherent danger to themselves, to the guards or others charged with
securing them, and to the public.

8 *Id.*, ¶ 24 (internal citations omitted). Thus, the Court held that “Long-distance
9 prisoner transportation...is an inherently dangerous activity as a matter of law.” *Id.*,
10 Critically, the Court went on to hold that it was not necessary for the plaintiff to
11 establish that the injury occurred “as a result of the typical unreasonable or unique
12 risks inherent in prisoner transport.” *Id.*, ¶ 29.

13
14 ACC contends Ms. Stokke’s injuries “...did not arise from the risks inherent in
15 mining and was not caused by engaging in such dangerous activities.” (Answer Br.,
16 25). Paull’s injuries likewise did not arise directly from the unique risks of interstate
17 prisoner transport. Paull was not injured during an escape attempt or other activity
18 unique to prisoner transfer. Yet, in *Paull*, the Court still found that the inherently
19 dangerous activity exception applied because the overall endeavor was inherently
20 dangerous. This exception applies equally here.

21
22 ACC makes the same mistake that the defendants in *Paull* made, namely,
23 focusing solely on the discrete activity that injured Ms. Stokke, rather than the
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endeavor of which she was an integral part. In *Paull*, the defendants argued that driving was not inherently dangerous, and thus the exception did not apply. *Id.*, ¶ 22. This Court rebuffed the argument and looked to all of the factors involved in interstate prisoner transport. The Court should do the same here. It is not the discrete act that must be dangerous (in both cases, driving), but rather the overall endeavor of which the act is an integral part.

ACC similarly offers an argument related to the *Cobos* case that the federal court likewise rejected. ACC misunderstands the Court's reasoning in *Cobos* when it argues that "the court reached [the conclusion that the inherently dangerous exception applied] by looking at the specific activities engaged by the plaintiff." (Answer Br., 27). ACC focuses on the fact that Cobos drilled holes in a rock face, loaded the holes with explosives, detonated the explosives, and then "mucked" out the broken rock. *Id.*, ACC again draws comparisons to the discrete, narrow act of the plaintiff in *Cobos* to Ms. Stokke. "Stokke was not an underground miner. She was not engaged in drilling, blasting, or clearing debris. *Though her work driving a water truck was in furtherance of and for the benefit of a bentonite mine*, she herself was not engaged in mining." *Id.*, (Emphasis added). ACC goes further, and contends that "the nature of the activity itself" is what controls. *Id.* ACC again frames the issue far too narrowly. The nature of the *discrete act* does not control ("breathing airborne particulates" in *Cobos*; driving a water truck here), but rather, the nature of the *overall* activity. In

1 both *Cobos* and here, that activity is mining. Mining is an inherently dangerous
2 activity. As ACC concedes, Stokke's acts were in furtherance of the mining
3 operation. 4N Trucking was hired to maintain the mine roads and control dust. Under
4 ACC's interpretation, the discrete act in *Cobos* is "breathing" and would not be
5 considered inherently dangerous.
6

7 The Court should, once again, rebuff this line of reasoning and instead look to
8 the greater overall activity and hold that the inherently dangerous exception does
9 apply. Ms. Stokke was not merely driving a water truck, as argued by ACC. Ms.
10 Stokke was driving a water truck on mine roads, in furtherance of an inherently
11 dangerous activity: mining. The reasoning in *Paull* and *Cobos* directly apply to the
12 facts at bar. Accordingly, the inherently dangerous activity exception to the general
13 independent-owner contractor rule applies. ACC thus owed a duty to Ms. Stokke.
14

15 **B. ACC retained sufficient control over 4N's work to invoke an**
16 **exception to the general independent contractor rule.**

17 This Court also recognizes an exception to the general owner-independent
18 contractor rule "where the general contractor negligently exercises control reserved
19 over a subcontractor's work." *Beckman* at ¶¶ 12, 31. The *Beckman* Court relied upon
20 § 414 of the Restatement (Second) of Torts (1965). Specifically, this section provides,
21

22 One who entrusts work to an independent contractor, but who retains the
23 control of any part of the work, is subject to liability for physical harm to
24 others for whose safety the employer owes a duty to exercise reasonable
care, which is caused by [the employer's] failure to exercise [its] control
with reasonable care."

1 *Beckman* at ¶ 32, citing Restatement (Second) of Torts § 414 (1965) (emphasis
2 added). The underlined portion of § 414 is dispositive. Ms. Stokke provided
3 numerous examples in her opening brief to show that ACC retained a level of control
4 over 4N Trucking's operations at the mine. (Opening Br. 29-30).

5
6 ACC responds that it "did not in any way direct the manner in which 4N
7 Trucking performed its work." (Answer Br. 34). ACC spills much ink distinguishing
8 the present case from the facts in *Shannon*, *Umbs*, *Beckman*, *Cunnington*, and *Fabich*.
9 ACC ultimately concludes, "Each of these cases finding retained control share a
10 general factual thread, namely that the owner or general contractor did or did not do
11 something which expressly directed or affected the manner in which the subcontractor
12 and its employees performed the work related to the accident." (Answer Br., 33).
13 ACC is right. However, it missteps when it ignores both contract language and
14 detrimental testimony from Kim Newlin, manager for 4N Trucking. Mr. Newlin
15 testified at his deposition that *ACC invited 4N Trucking to use their well*. (Stokke
16 Response to ACC Mot. Summ. J., Dkt. 62., Ex "8" Kim Newlin Depo. 95:4-6).
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18

19 Furthermore, the ACC-4N Trucking contract gives ACC meaningful power to
20 establish practices on site. ACC retains the right to inspect 4N's equipment, and
21 impose its own rules and regulations on 4N. Specifically, "...4N shall observe all of
22 the rules and regulations required by ACC at the plant or mining sites..." (Contract at
23 5, see App. 2). ACC also has the right to terminate the contract for 4N's failure to
24

1 comply with any “safety laws, rules and regulations.” ACC, and the District Court,
2 analogized the contract here to the contract in *Fabich v. PPL Montana, LLC*. 2007 MT
3 258. (ACC Summ. J. Order, Dkt. 72 at 7; Answer Br.34). In *Fabich*, the contract
4 gave the owner the right to stop work, and to give orders only in the case of an
5 emergency. *Fabich* at ¶ 30. The contract grants ACC more expansive and meaningful
6 authority over 4N than the contract in *Fabich*. ACC’s invitation to use the well,
7 combined with the right to impose rules of its choosing and terminate the contract if
8 not followed, establishes a duty.

10 Finally, ACC argues it had no reason to know whether 4N was operating
11 negligently. (Answer Br. 38). ACC concludes, “There is also no evidence that the
12 work performed by 4N Trucking was performed in an unreasonably dangerous
13 manner or, if it was, that American Colloid knew or should have known about it.”
14 (Answer Br.37-38). ACC’s argument here ignores the entire Mining Safety and
15 Health Act regulatory scheme. As Ms. Stokke’s mine safety expert Jack Spadaro
16 reported, ACC had a duty under federal law to ensure that it kept its property safe by
17 ensuring all means of access to working places be maintained in a safe manner.
18 (Stokke Response to ACC Mot. Summ. J., Dkt. 62, Ex. 5 at 3).

21 In sum, the contract here gives ACC the right to impose rules and regulations of
22 its choosing, thus granting control over 4N Trucking. Under *Beckman*, and § 414 of
23 the Restatement (Second) of Torts , an owner that retains control of any part of the
24

1 work can be liable to independent contractors and their employees. *Beckman* at ¶¶ 32-
2 35.

3
4 **C. ACC had a nondelegable statutory duty to Stokke.**

5 Finally, ACC argues that “liability may be based upon non-delegable duty *only*
6 when a contractual provision establishes that the owner has assumed responsibility”
7 for safety precautions. (Answer Br. 38)(emphasis original). ACC is incorrect. A
8 nondelegable duty can arise under *either* contract *or* statute. To hold otherwise,
9 would be to allow parties to contract around statutorily-imposed safety obligations.

10 This Court has recently recognized that parties cannot contract around their
11 statutory safety obligations. In *State v. Butte-Silver-Bow County*, 2009 MT 414, 220
12 P.3d 1115, the Court recognized that the “Scaffolding Act imposes a nondelegable
13 duty to ensure workplace safety.” *Id.*, ¶ 26. The court held, contracts do not remove
14 the nondelegable duty of care imposed” by statutes. *Id.*, ¶ 25. *See also United Nat.*
15 *Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 2009 MT 269, ¶ 18, 214 P.3d 1260, 166
16 (“A violation of the duties imposed by the Scaffolding Act imposes absolute
17 liability.”).
18
19

20 Furthermore, “all contracts that have for their object, directly or indirectly, to
21 exempt anyone from responsibility for the person’s . . . violation of law, whether
22 willful or negligent, are against the policy of the law.” Mont. Code Ann. § 28-2-702.
23 They are thus, invalid. *See, e.g., Miller v. Fallon County*, 222 Mont. 214, 220, 721
24

1 P.2d 342, 347 (1986). Here, to the extent that ACC attempts by contract to shift its
2 safety responsibility under the MSHA to another, such contractual provisions are
3 invalid as a matter of law. *Id.*, As Ms. Stokke explained in her opening brief, ACC
4 has nondelegable duties of safety under the MSHA. Violation of those duties is
5 evidence of negligence.
6

7 **CONCLUSION**

8 For the following reasons, Ms. Stokke respectfully asks that the Court reverse
9 the district court's summary judgment order and remand for further proceedings.

10 DATED this 17th day of August, 2017.

11
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DATED this 17th day of August, 2017.

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